

## PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298



December 24, 2001

CA-9  
1/23/2002

TO: PARTIES OF RECORD IN APPLICATION 00-12-026

This is the draft decision of Administrative Law Judge (ALJ) Kenney. It will be on the Commission's agenda at the next regular meeting 30 days after the above date. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at <http://www.cpuc.ca.gov>.

Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ LYNN T. CAREW by psw  
Lynn T. Carew, Chief  
Administrative Law Judge

LTC:eap

Attachment

Decision: **DRAFT DECISION OF ALJ KENNEY** (mailed 12/24/01)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of Pacific Gas and Electric Company  
(U 39 M) for Section 851 Approval of Agreements  
Allowing Access to Electric Distribution Facilities  
for the Installation and Maintenance of  
Telecommunications Equipment.

Application 00-12-026  
(Filed December 19, 2000)

**INTERIM OPINION APPROVING NINE OF  
THIRTEEN AGREEMENTS FOR THE LEASE OF PROPERTY  
OWNED BY PACIFIC GAS AND ELECTRIC COMPANY**

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## **I. Summary**

In Application (A.) 00-12-026, Pacific Gas and Electric Company (PG&E) requests authority under Pub. Util. Code § 851 to convert 13 license agreements into lease agreements.<sup>1</sup> Each agreement establishes terms and conditions for installing equipment on PG&E's electric distribution facilities. Today's decision grants PG&E authority under § 851 to convert nine of the 13 license agreements into lease agreements.<sup>2</sup> The remaining four agreements will be addressed in a future decision after further review of the agreements' compliance with § 851 and the California Environmental Quality Act.<sup>3</sup>

## **II. PG&E's Application**

The nine agreements that are the subject of today's decision were executed over a four-year period beginning in 1996. In each agreement, PG&E grants a license to a telecommunications carrier pursuant to General Order (G.O.) 69-C to install telecommunications equipment on PG&E's electric distribution facilities. Each of the nine carriers has installed equipment pursuant to its license agreement. All nine carriers have certificates of public convenience and necessity (CPCNs) from the Commission to operate in California.

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<sup>1</sup> All statutory references are to the Public Utilities Code unless otherwise noted.

<sup>2</sup> The nine agreements addressed by today's decision are between PG&E and the following parties: (i) Advanced TelCom Group, Inc., (ii) Brooks Fiber Communications of Bakersfield, Inc., (iii) Brooks Fiber Communications of Fresno, Inc., (iv) Brooks Fiber Communications of San Jose, Inc., (v) Brooks Fiber Communications of Stockton, Inc., (vi) Fiber Communications, Inc., (vii) Sprint Communications Company L.P., (viii) RCN Telecom Services, Inc., and (ix) Seren Innovations, Inc.

<sup>3</sup> The four agreements that will be addressed in a future decision are between PG&E and the following parties: (i) the San Luis Coastal Unified School District, (ii) the Dublin Unified School District, (iii) Metropolitan Fiber Systems of California, Inc., and (iv) MCI Telecommunication Corp.

G.O. 69-C provides PG&E with authority to grant licenses for the use of its facilities. Any license granted by PG&E pursuant to G.O. 69-C must be revocable at any time by PG&E, and must not interfere with PG&E's operations or services. PG&E states that the carriers choose to obtain licenses under G.O. 69-C in order to obtain immediate access to PG&E's facilities.

To provide the carriers with long-term, uninterrupted access to PG&E's facilities, the nine agreements, which PG&E refers to as "Master Agreements," require PG&E to file an application for authority under § 851 to convert the license agreements into lease agreements. The Master Agreements stipulate that the conversion of the Agreements into leases will not become effective until after the Commission approves the conversion. Any G.O. 69-C licenses granted by PG&E under the Agreements will terminate once the Agreements are converted into § 851 leases, and any equipment previously installed under G.O. 69-C will automatically become subject to the lease provisions in the Agreements. The duration of the Master Agreements as a license, lease, or combination of the two is five years, with a one-time renewal option for an additional five years.

The Master Agreements establish terms and conditions for installing equipment on PG&E's electric distribution facilities located anywhere in PG&E's service territory. Once a carrier has identified sites where it wishes to install equipment, PG&E will determine if the equipment can be installed safely and without adverse effects to PG&E's electric distribution system. The Agreements limit the installation of carriers' equipment to only those PG&E facilities that (1) have unused space, and (2) are located within PG&E's existing utility rights-of-way. The Agreements also provide that the carriers must install and maintain

their equipment in accordance with all applicable laws and regulations, including G.O. 95 and G.O. 128.<sup>4</sup>

The Master Agreements allow PG&E to reclaim space used by a carrier if PG&E needs the space to provide utility service. If space is reclaimed, the Agreements require PG&E to make a good faith effort to provide alternate space by rearranging existing facilities or adding new facilities. If this is not possible, the carriers simply lose their space.

The Master Agreements require the carriers to reimburse PG&E for any costs incurred by PG&E in connection with the carriers' installations. The Agreements also require the carriers to pay various fees to PG&E. For example, carriers must pay mapping and engineering fees, as well as a fee for each attachment.<sup>5</sup> The Master Agreements also require each carrier to pay a one-time fee of \$10,000 for PG&E to file an application at the Commission for authority under § 851 to convert the license agreements into lease agreements. In addition, the Agreements require PG&E to request authority from the Commission for an unlimited number of installations under the Agreements without the need for additional filings. If the Commission denies the request, the carriers must pay \$5,000 for each subsequent filing. PG&E states that all revenues will be credited "above the line" to electric ratepayers for general rate case purposes.

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<sup>4</sup> G.O. 95 specifies standards for the construction, maintenance, operation, and use of overhead electrical and communications facilities. G.O. 128 does the same for underground facilities.

<sup>5</sup> The Agreements define "attachment" as a single contact on a pole to accommodate or support a single cable or piece of equipment and, with respect to underground facilities, the installation of one cable within a conduit or inner duct.

PG&E requests authority to make the following “insubstantial amendments” to the Master Agreements without having to file a new application:

- Installations and removals of equipment that are made in accordance with the provisions of the Master Agreements.
- One-time renewals of Master Agreements that are made in accordance with Section 2.5 of the Agreements.
- Reductions in the duration of the Master Agreements.
- Revisions in the amount of the fees paid to PG&E that are made in accordance with (i) the Master Agreements, and (ii) the rules, regulations, or orders of the Commission or a court of law.
- Assignments of the Master Agreements.
- Other insubstantial amendments agreed to by the parties.

PG&E states that prior approval of minor amendments will avoid unnecessary expenditures of resources by the Commission, PG&E, and the carriers.

PG&E believes that it is unnecessary for the Commission to conduct an environmental review of the Master Agreements. This is because each of the nine carriers that are parties to the Agreements obtained its CPCN in a proceeding where the Commission adopted a mitigated negative declaration regarding the activities authorized by the carrier’s CPCN. PG&E states the mitigated negative declarations encompass the types of activities that will occur under the Master Agreements, since the Agreements are specifically limited to activities that (1) are covered by the carriers’ CPCNs, and (2) conform with all applicable laws, including Commission orders.

PG&E offers several reasons why it is in the public interest for the Commission to authorize the conversion of the Master Agreements into § 851 leases. First, the Agreements are consistent with the Commission’s policy of favoring the use of existing utility facilities for the development of

telecommunications infrastructure. Second, the Agreements are structured to prevent the carriers' use of PG&E's facilities from interfering with PG&E's electric operations or adversely affecting service to PG&E's customers. Third, the Agreements benefit the carriers by enabling them to expand and improve their service using existing utility facilities. Fourth, the fees paid by the carriers will benefit PG&E's electric ratepayers. Fifth, the Agreements are consistent with Commission rules governing access to utility rights-of-way (ROW) by telecommunication companies that were adopted in Decision (D.) 98-10-058, as modified by D.00-03-055 (ROW decisions). Finally, the Agreements will not have an adverse effect on the environment, since any installation by a carrier must comply with the carrier's mitigated negative declaration.

### **III. Protest and Response**

A protest to A.00-12-026 was jointly filed by AT&T Communication of California, Inc., XO California, Inc., and the California Cable Television Association (collectively, "Protestants"). The Protestants argue that it is improper for PG&E to seek Commission approval of the Master Agreements pursuant to § 851. Section 851 states, in relevant part, as follows:

No public utility...shall...lease...any part of its...plant, system or other property necessary or useful in the performance of its duties to the public...without first having secured from the commission an order authorizing it to do so. (Emphasis added.)

The Protestants contend that § 851 does not apply to the Master Agreements, since the Agreements do not allow the carriers to install equipment in space that is necessary or useful.



The Protestants next argue that the Master Agreements are licenses that are subject to G.O. 69-C, and that such licenses do not require Commission approval under § 851. G.O. 69-C states, in relevant part, as follows:

[P]ublic utilities...are...authorized to grant...licenses...for use [of their property]...without further special authorization by this Commission whenever it shall appear that the exercise of such...license...will not interfere with the operations...of such public utilities...provided, however, that each such grant...shall be made conditional on the right of the grantor...to commence or resume use of the property...whenever...it shall appear necessary or desirable to do so. (Emphasis added.)

The Protestants assert that there are two key criteria for determining when an agreement is a license that is subject to G.O. 69-C. First, the agreement must be limited to the use of utility property that is not necessary or useful in the performance of the utility's duties to the public. The Protestants state that the Master Agreements satisfy this criterion. Second, the utility must be able to terminate the agreement at any time. The Protestants contend that the Master Agreements satisfy this criterion, since Section 7.3 of the Agreements allows PG&E to reclaim space from the carriers whenever PG&E needs the space for the provision of utility service. The Protestants also contend that the Master Agreements are licenses because of their similarity to a G.O. 69-C license agreement that PG&E filed at the Commission in Advice Letter (AL) 2063-E.<sup>6</sup>

The Protestants believe that PG&E's motive for filing A.00-12-026 is to use the Commission's procedures to extract unreasonable fees for the use of its

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<sup>6</sup> Master Pole, and Underground Facilities License Agreement for PG&E and NEXTLINK California, Inc., [now XO Communications] submitted to the Commission by PG&E in AL Letter 2063-E, dated December 20, 2000.

bottleneck facilities. The unreasonable fees include (1) a one-time charge of \$10,000 to file A.00-12-026, (2) a \$5,000 fee for each additional filing, and (3) attachment, engineering, and rearrangement fees that exceed PG&E's costs in contravention of the ROW decisions. The Protestants are concerned that PG&E's attempt to extract unreasonable fees will, if approved, encourage PG&E and other utilities to extract unreasonable fees in the future.

Finally, the Protestants note that PG&E has an affiliate engaged in telecommunications-related activities.<sup>7</sup> The Protestants contend that PG&E is attempting to hinder the affiliate's competitors by making the competitors' access to PG&E's facilities more difficult and expensive.

PG&E denies the Protestants' accusation that it is attempting to make access to its facilities more difficult and expensive. PG&E also disputes the Protestants' claim that the Master Agreements are G.O. 69-C licenses because PG&E can terminate the Agreements at anytime. PG&E states that Article X of the Agreements provides that once the Commission has approved the Agreements as § 851 leases, PG&E may terminate the Agreements only under the following circumstances: (1) material breach; (2) failure to maintain a CPCN; (3) assignment without consent; (4) failure of the attaching carrier to obtain permission from underlying land owners, which results in legal proceedings; and (5) written mutual agreement.

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<sup>7</sup> In AL 2276-G/2054-G, dated November 14, 2000, PG&E notified the Commission that it had created an affiliate called PG&E Telecom, LLC.

#### IV. Discussion

##### A. General Order 69-C

A threshold issue is whether the Master Agreements are licenses subject to G.O. 69-C. If the Agreements are G.O. 69-C licenses, they can be executed without further authorization from the Commission, and A.00-12-026 should be dismissed as unnecessary.<sup>8</sup>

We agree with the Protestants that in order for the Master Agreements to qualify as licenses subject to G.O. 69-C, the Agreements must be revocable by PG&E at any time. After carefully reviewing the Master Agreements, we conclude that the Agreements are not revocable at any time. This is evident from Article X of the Agreements, which provides that PG&E can terminate an Agreement only under specified circumstances, such as a material breach or a failure by a carrier to maintain its CPCN.<sup>9</sup>

We are not persuaded by the Protestants' assertion that Section 7.3 of the Master Agreements allows PG&E to revoke an Agreement at any time. This Section provides that a carrier must remove its equipment from a PG&E facility if PG&E needs the facility for its own use. This Section also provides that PG&E must give at least 90 days' notice prior to removal, except there may be less notice in an emergency. We find that the requirement to provide 90 days' notice does not give PG&E the power to revoke a Master Agreement at any time. Our

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<sup>8</sup> D.96-04-045, 65 CPUC 2d 324, 328, and 331.

<sup>9</sup> Section 10.1(b)(4) of Article X states that the Master Agreement may be terminated in accordance with Section 2.1 if PG&E or the Commission invokes G.O. 69-C. Section 2.1, in turn, grants a license to install equipment on PG&E's facilities until the Commission approves the conversion of the license into a lease. Once the conversion is complete, the license is

*Footnote continued on next page.*

finding is consistent with D.96-04-045 wherein the Commission held that agreements for the use of utility facilities that could be terminated with as little as two weeks' notice were not G.O. 69-C licenses, but § 851 leases.<sup>10</sup>

We are not persuaded by the Protestants' assertion that the Master Agreements should be deemed license agreements because the Agreements are similar to a license agreement filed at the Commission by PG&E in AL 2063-E. Unlike the Master Agreements, the license agreement in AL 2063-E may be terminated at any time by PG&E in accordance with G.O. 69-C.

### **B. Section 851**

Section 851 provides that no public utility shall lease property that is necessary or useful in the performance of its duties to the public without prior authority from the Commission. The standard for determining whether a lease should be authorized pursuant to § 851 is whether the lease is in the public interest.<sup>11</sup> If necessary, the Commission may withhold authority for a lease or attach conditions to the lease in order to protect and promote the public interest.<sup>12</sup>

The property that is subject to the Master Agreements is currently being used by PG&E to distribute electric power to the public. Therefore, the property is useful, and the conversion of the Agreements into leases is subject to § 851.

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terminated, and Section 2.1 no longer applies. Once Section 2.1 becomes inapplicable, Section 10.1(b)(4) also becomes inapplicable.

<sup>10</sup> D.96-04-045, 65 CPUC 2d 324, 329, and 331 – 334.

<sup>11</sup> D.01-10-001, 2001 Cal. PUC LEXIS 932, \*16; and D.01-10-002, 2001 Cal. PUC LEXIS 946, \*14.

<sup>12</sup> D.01-06-007, Fn. 41, 2001 Cal. PUC LEXIS 390, \*25.

We find that the Master Agreements are in the public interest and should be approved. We have repeatedly held that the public interest is served when, as is the case here, utility property is used for other productive purposes.<sup>13</sup> As we stated in D.00-07-010:

It is sensible for...energy utilities, with their extensive easements, rights-of-way, and cable facilities, to cooperate...with telecommunications utilities...Joint use of utility facilities has obvious economic and environmental benefits. The public interest is served when utility property is used for other productive purposes without interfering with the utility's operation or affecting service to utility customers. (D.00-07-010, *mimeo*, p. 6.)

Another public benefit of the Master Agreements is that the revenues from the Agreements will flow to PG&E's electric ratepayers. Over the long run, these revenues will provide a relatively small but nonetheless welcome offset to the recent rate hikes brought about by the California electricity crisis.

We find nothing in the Master Agreements that will harm the public interest. The Agreements require the carriers to install and maintain their equipment in accordance with all applicable laws, regulations, and safety requirements, including G.O. 95 and G.O. 128.<sup>14</sup> The Agreements also provide PG&E with ample ability to operate its electric distribution system in a safe and reliable manner. In addition, the Agreements provide PG&E with the right to reclaim any facility that PG&E may need for utility operations. Furthermore, the Master Agreements will not have an adverse impact on the environment for the

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<sup>13</sup> D.00-06-057, *mimeo.*, p. 7; D.00-06-056, *mimeo.*, p. 7; D.00-02-041, *mimeo.*, p. 10; D.99-04-066, *mimeo.*, p. 5; D.99-03-016, *mimeo.*, p. 14; D.99-02-036, *mimeo.*, pp. 6-7; D.99-02-035, 1999 Cal. PUC LEXIS 40 \*11; and D.93-04-019, 48 CPUC 2d 601, 603.

<sup>14</sup> Master Agreements, Section 4.1.

reasons stated later in this decision. Finally, we have authorized the lease of utility property many times in the past,<sup>15</sup> and we are not aware of any harm to the public interest that has occurred as a result of these leases. Given our experience, we have no reason to expect that the proposed leases before us in this proceeding will prove detrimental to the public interest.

To avoid unnecessary expenditures of resources by the Commission and PG&E, we grant PG&E's request to make the following minor amendments to the Master Agreements without additional approval from the Commission:

- Installations and removals of carriers' equipment that are made in accordance with the Master Agreements.
- One-time renewals of Master Agreements that are made in accordance with Section 2.5 of the Agreements.
- Reductions in the duration of the Master Agreements.
- Revisions in the amount of the fees paid to PG&E that are made in accordance with (i) the applicable Master Agreement, and (ii) the rules, regulations, or orders of the Commission or a court of law.

We may determine *ex post facto* whether any amendment is minor. If PG&E implements an amendment that we later determine is not minor, the amendment may be deemed void under § 851, and PG&E may be subject to monetary penalties and other sanctions for having violated § 851 and today's decision.

We decline to grant PG&E's request for authority to assign the Master Agreements without prior approval from the Commission. The Master Agreements confer rights and obligations that substantially affect the ability of PG&E and the carriers to serve the public. Consequently, we have a duty under

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<sup>15</sup> See, for example, D.00-01-014, D.00-07-010, D.00-06-057, D.00-06-056, D.00-02-041, D.99-09-070, D.99-04-066, D.99-03-020, D.99-03-016, D.99-02-061, D.99-02-036, D.99-02-035,

*Footnote continued on next page.*

§ 851 to review and approve each assignment in order to ensure that the assignment is in the public interest.

We also decline to grant PG&E's request for authority to make "other insubstantial amendments" to the Master Agreements without prior approval from the Commission. PG&E did not offer any criteria for determining what constitutes an "other insubstantial amendment." Without more information, we conclude that it is imprudent to grant PG&E's request.

We disagree with the Protestants' argument that § 851 does not apply to the Master Agreements because the Agreements only allow the carriers to use surplus space on PG&E's facilities. When an asset is in rate base, as is the case here, the entire asset is devoted to the provision of service to the public. The plain language of § 851 compels the conclusion that parts of the asset may not be encumbered or disposed of without our prior approval.<sup>16</sup>

We are not persuaded by the Protestants' assertion that the Master Agreements require the carriers to pay unreasonable fees. If this were the case, presumably at least one of the carriers would have said so in this proceeding, but none did.<sup>17</sup> Furthermore, the Protestants did not present any information to support their assertion that the fees violate our ROW decisions. Since none of the carriers objected to the fees, we decline to conclude based on the record before us that the fees are unreasonable.

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D.98-07-015, D.98-07-006, D.98-02-110, and D.96-12-024.

<sup>16</sup> D.92-07-007, 45 CPUC 2d 24, 29.

<sup>17</sup> All carriers that are parties to the Agreements received a copy of A.00-12-026. (A.00-12-026, p. 17)

### **C. California Environmental Quality Act**

The Commission has an obligation under the California Environmental Quality Act (CEQA) to consider the environmental consequences of PG&E's request for authority under § 851 to convert the Master Agreements into lease agreements.<sup>18</sup> The Commission previously considered the environmental consequences of the activities contemplated by the Master Agreements in the decisions where the Commission granted CPCNs to the carriers that are parties to the Agreements. In those decisions, the Commission adopted mitigated negative declarations that are applicable to the activities that will occur under the Master Agreements.<sup>19</sup> Consequently, there is no need to conduct further environmental review of the Master Agreements.

### **D. Compliance with Section 851 and CEQA**

We have expressed concern in recent decisions that utilities might instigate transactions and activities under G.O. 69-C in order to evade the advance review and approval requirements of § 851 and CEQA.<sup>20</sup> We have carefully reviewed the Master Agreements, and find that the Agreements do not circumvent § 851. This is because the Agreements properly grant G.O. 69-C licenses for the use of PG&E's facilities, and the conversion of the licenses into leases, which is subject

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<sup>18</sup> Public Resources Code § 21080.

<sup>19</sup> Section 1.4 of the Master Agreements states that the Agreements apply only to activities that are covered by the carriers' CPCNs. Each carrier is required by its CPCN to comply with the mitigated negative declaration associated with the CPCN. (See D.95-12-057 (granting CPCNs to Brooks Fiber of Fresno, Brooks Fiber of San Jose, Brooks Fiber of Stockton, and Brooks Fiber of Bakersfield); D.97-08-045 (granting CPCN to Sprint); D.98-09-066 (granting CPCNs to RCN Telecom and Fiber Communications); D.98-12-083 (granting CPCN to Advanced Telecom Group); and D.99-06-083 (granting CPCN to Seren Innovations)).

<sup>20</sup> D.01-06-059, *mimeo.*, pp. 7-8; D.01-03-064, *mimeo.*, pp. 7-12; and D.00-12-006, *mimeo.*, pp. 6-7.



to § 851, does not become effective until after the Commission has reviewed and approved the conversion. We also find that the Master Agreements do not circumvent CEQA. As described earlier, the Commission previously conducted a CEQA review of the activities contemplated by the Master Agreements and adopted mitigated negative declarations applicable to these activities.

We remain concerned that utilities might attempt to use G.O. 69-C to circumvent § 851 and CEQA. We caution utilities that any use of G.O. 69-C to evade § 851 and CEQA will be subject to monetary penalties and other sanctions.

## **V. Procedural Matters**

In Resolution ALJ 176-3053, dated December 21, 2000, the Commission preliminarily determined that this proceeding should be categorized as ratesetting, and that hearings were not necessary. PG&E and the Protestants subsequently filed written statements in which they declared that hearings were not necessary. Based on the record in this proceeding, we affirm and finalize the preliminary determinations contained in Resolution ALJ 176-3053.

Public Utilities Code § 311(g)(1) requires the draft decision to be (i) served on all parties, and (ii) subject to at least 30 days of public review and comment prior to a vote of the Commission. The draft decision of ALJ Kenney was mailed on December 24, 2001, pursuant to § 311(g)(1) and Rule 77.7. Opening comments were filed on \_\_\_\_\_, 2001, by \_\_\_\_\_. Reply comments were filed on \_\_\_\_\_, 2001, by \_\_\_\_\_. These comments have been reflected, as appropriate, in the final decision adopted by the Commission.

## **Findings of Fact**

1. In each of the nine Master Agreements addressed by this decision, PG&E grants a license to a telecommunications carrier pursuant to G.O. 69-C to install telecommunications equipment on PG&E's electric distribution facilities. Each

carrier has (i) a CPCN to operate in California, and (ii) installed equipment on PG&E's facilities pursuant to its G.O. 69-C license.

2. Each Master Agreement requires PG&E to file an application for authority under § 851 to convert the Agreement from a G.O. 69-C license into a § 851 lease. Each Agreement states that the conversion will not become effective until the Commission approves it.

3. All license-related provisions in the Master Agreements terminate once the Agreements are converted into § 851 leases. All installations by the carriers that were made pursuant to the G.O. 69-C license provisions in the Agreements automatically become subject to the lease provisions in the Agreements after the Agreements are converted into § 851 leases.

4. The duration of the Master Agreements is five years, with a one-time renewal option for an additional five years.

5. The Master Agreements state that PG&E will determine if the carriers' equipment can be installed safely and without adversely affecting PG&E's electric distribution system. The Agreements limit the installation of carriers' equipment to those PG&E facilities that (i) have unused space, and (ii) are located within utility rights-of-way. The Master Agreements allow PG&E to reclaim space from a carrier if PG&E needs the space to provide utility service.

6. The Master Agreements require carriers to reimburse PG&E for any costs it incurs in connection with the carriers' installations.

7. The Master Agreements require the carriers to pay various fees to PG&E, including: (i) mapping and engineering fees, (ii) attachment fees, (iii) a one-time fee of \$10,000 for PG&E to file an application at the Commission for authority under § 851 to convert the license agreement into a lease agreement, and (iv) a fee of \$5,000 for each subsequent filing at the Commission.

8. PG&E represents that all fees it receives under the Master Agreements will be credited “above the line” to electric ratepayers for general rate case purposes.

9. Each carrier that is a party to the Agreements obtained its CPCN in a proceeding where the Commission adopted a mitigated negative declaration regarding the activities authorized by the carrier’s CPCN. Each carrier is required by its CPCN to comply with its mitigated negative declaration.

10. The Master Agreements provide that carriers may install their equipment on PG&E’s facilities only to the extent the installations are consistent with the activities authorized by the carriers’ CPCNs

11. The Master Agreements require carriers to install and maintain their equipment in conformity with all applicable laws, rules, and regulations.

12. The Master Agreements are structured to prevent the carriers’ use of PG&E’s facilities from interfering with PG&E’s operations or adversely affecting service to PG&E’s customers.

13. There is no evidence in this proceeding that (i) any carrier believes it is required to pay unreasonable fees by the Master Agreements, or (ii) the Master Agreements establish fees that violate the Commission’s ROW decisions.

14. In recent orders, the Commission has expressed concern that utilities might use G.O. 69-C to circumvent the advance review and approval requirements of § 851 and CEQA.

### **Conclusions of Law**

1. G.O. 69-C provides utilities with authority to grant licenses for the use of their facilities. Any license granted by a utility pursuant to G.O. 69-C must be revocable at any time by the utility.

2. In D.96-04-045, the Commission held that agreements for the use of utility facilities that could be terminated with as little as two weeks' notice were not G.O. 69-C licenses, but § 851 leases.

3. The Protestants are incorrect in their assertion that the Master Agreements are G.O. 69-C licenses because, in part, PG&E can revoke the Agreements at any time. The Agreements allow PG&E to reclaim space from a carrier after providing 90 days' notice. The requirement to provide 90 days' notice does not allow PG&E to revoke the Agreements at any time.

4. The Protestants are incorrect in their assertion that the Master Agreements are G.O. 69-C licenses because, in part, the Agreements are similar to a license agreement that PG&E filed in AL 2063-E. Unlike the Master Agreements, the license agreement in AL 2063-E can be terminated at any time by PG&E in accordance G.O. 69-C.

5. Section 851 provides that no public utility shall lease property that is necessary or useful in the performance of its duties to the public without first having secured from the Commission an order authorizing it so to do.

6. The conversion of the Master Agreements into leases is subject to § 851, since the property that is subject to the Master Agreements is currently being used by PG&E for distributing electric power to the public.

7. The standard for determining whether the conversion of the Master Agreements into leases should be authorized pursuant to § 851 is whether the conversion is in the public interest. The Commission may withhold authority for the conversion or attach conditions to the conversion in order to protect and promote the public interest.

8. The conversion of the Master Agreements into leases will benefit the public interest because: (i) the Agreements provide economic and environmental

benefits by allowing carriers to use PG&E's extensive easements, rights-of-way, and electric distributions facilities to build and expand their telecommunications network; and (ii) revenues from the Agreements will flow to PG&E's ratepayers.

9. The conversion of the Master Agreements into leases will not harm the public interest because: (i) the Agreements require the carriers to install and maintain their equipment on PG&E's facilities in accordance with all applicable laws, regulations, and safety requirements; (ii) the Agreements will not adversely affect PG&E's operations or services to the public; (iii) the Agreements provide PG&E with the right to reclaim any leased facility that it may need for utility operations; (iv) the leases will not have an adverse impact on the environment; and (v) the Commission has authorized similar leases many times in the past, and based on this experience there is no reason to expect that the Master Agreements will prove detrimental to the public interest.

10. The conversion of the Master Agreements into lease agreements is in the public interest and should be authorized pursuant to § 851.

11. To avoid unnecessary expenditures of resources by the Commission and PG&E, PG&E should be authorized to make the following minor amendments to the Master Agreements:

- a. Installations and removals of carriers' equipment that are made in accordance with the Master Agreements.
- b. One-time renewals of Master Agreements that are made in accordance with Section 2.5 of the Agreements.
- c. Reductions in the duration of the Master Agreements.
- d. Revisions in the amount of the fees paid to PG&E that are made in accordance with (i) the applicable Master Agreement, and (ii) the rules, regulations, or orders of the Commission or a court of law.

12. The Commission has discretion to determine at a later date whether any particular amendment to a Master Agreement is minor.

13. If PG&E implements an amendment that the Commission later determines is not minor, the amendment may be deemed void under § 851, and PG&E may be subject to monetary penalties and other sanctions for having violated § 851 and today's decision.

14. PG&E's request for authority to assign the Master Agreements without prior Commission approval should be denied. The Agreements confer rights and obligations that substantially affect the ability of PG&E and the carriers to serve the public. Therefore, the Commission has a duty under § 851 to review and approve any assignment to ensure that it is in the public interest.

15. PG&E's request for authority to make "other insubstantial amendments" to the Master Agreements without prior Commission approval should be denied. PG&E did not offer any criteria for determining what constitutes an insubstantial amendment. Without such criteria, it is imprudent to grant PG&E's request.

16. The Protestants are incorrect in their assertion that § 851 does not apply to the Master Agreements because the Agreements only allow the carriers to use surplus space on PG&E's facilities. When an asset is in rate base, as is the case here, it is devoted in its entirety to the provision of service to ratepayers, and the plain language of § 851 compels the conclusion that parts of the asset may not be disposed of without prior Commission approval.

17. The Commission previously considered the environmental consequences of the activities contemplated by the Master Agreements in the decisions where the Commission granted CPCNs to the carriers that are parties to the Agreements. Consequently, there is no need to conduct further environmental review of the Master Agreements.

18. The Master Agreements do not circumvent § 851. The conversion of the G.O. 69-C license agreements into lease agreements, which is subject to prior review and approval under § 851, does not become effective until after the Commission has reviewed and approved the conversion.

19. The Master Agreements do not circumvent CEQA, since the Commission previously conducted a CEQA review of the activities contemplated by the Agreements.

20. All revenues that PG&E receives from the Master Agreements should be credited to PG&E's electric ratepayers.

21. The following order should be effective immediately so that its provisions may be implemented expeditiously.

## **I N T E R I M   O R D E R**

### **IT IS ORDERED** that:

1. Pacific Gas and Electric Company (PG&E) is authorized pursuant to Pub. Util. Code § 851 to convert nine of the 13 Master Agreements appended to Application (A.) 00-12-026 into lease agreements. The nine Agreements addressed by this Order are between PG&E and the following parties:

(i) Advanced TelCom Group, Inc., (ii) Brooks Fiber Communications of Bakersfield, Inc., (iii) Brooks Fiber Communications of Fresno, Inc., (iv) Brooks Fiber Communications of San Jose, Inc., (v) Brooks Fiber Communications of Stockton, Inc., (vi) Fiber Communications, Inc., (vii) Sprint Communications Company L.P., (viii) RCN Telecom Services, Inc., and (ix) Seren Innovations, Inc.

2. PG&E may make minor amendments to the nine Master Agreements as set forth in the Conclusions of Law. All other amendments are subject to prior review and approval by the Commission pursuant to § 851.

3. The Commission may determine ex post facto whether any amendment to the Master Agreements is minor. If PG&E implements an amendment that the Commission later determines is not minor, the amendment may be deemed void under § 851, and PG&E may be subject to monetary penalties and other sanctions for having violated § 851 and this order.

4. PG&E's authority to convert the Master Agreements into leases shall expire if not exercised within 60 days from the effective date of this order.

5. Within 60 days from the effective date of this order, PG&E shall file and serve written notice that states whether the Master Agreements that are the subject of this Order have been converted into leases.

6. All revenues that PG&E receives from the Master Agreements shall be credited to PG&E's electric ratepayers.

7. Application 00-12-26 is granted to the extent set forth in the previous Ordering Paragraphs.

8. The protest of A.00-12-026 is denied.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.